

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**

In the matter of	:	
	:	
Review of the Section 251 Unbundling	:	CC Docket No. 01-338
Obligations of Incumbent Local Exchange	:	
Carriers	:	

**COMMENTS OF
THE PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE,
THE OHIO CONSUMERS' COUNSEL,
THE NEW HAMPSHIRE OFFICE OF CONSUMER ADVOCATE,
THE WEST VIRGINIA CONSUMER ADVOCATE DIVISION, AND
THE MARYLAND OFFICE OF PEOPLE'S COUNSEL**

1. INTRODUCTION

On December 20, 2001, the Federal Communications Commission ("FCC") released a Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding as its first triennial review of its policies on unbundled network elements ("UNEs"). Pursuant to the NPRM, the FCC is considering the circumstances under which incumbent local exchange carriers ("ILECs") must make parts of their networks available to requesting carriers on an unbundled basis under section 251(c)(3) and 251(d)(2) of the Telecommunications Act of 1996 ("TA-96").¹

¹ NPRM at ¶1; *citing* 47 U.S.C. §251(c)(3), (d)(2).

The Pennsylvania Office of Consumer Advocate (“PA OCA”), the Ohio Consumers’ Counsel (“OCC”), the New Hampshire Office of Consumer Advocate (“NH OCA”), the West Virginia Consumer Advocate Division (“W.Va. CA”) and the Maryland Office of People’s Counsel (“Md. OPC”) (collectively referred to as “Consumer Advocates”) are each individually authorized by their respective state statute to represent the interests of utility consumers in their state in state and federal courts and agencies.² The Consumer Advocates are actively involved in representing consumer interests in telecommunications issues in these venues and are, therefore, familiar with the issues contained in this NPRM.

The Consumer Advocates submit, *inter alia*, that the FCC should continue to ensure state commissions’ ability to require ILEC’s to provide the UNE platform (“UNE-P”). The UNE-P is the basis for much of the local residential telephone competition in Pennsylvania and Ohio, as well as other states. If, for example, the Pennsylvania Public Utility Commission (“PA PUC”) were no longer able to require Verizon-Pennsylvania, the dominant Pennsylvania ILEC, and the Public Utility Commission of Ohio (“PUCO”) were no longer able to require Ameritech Ohio, the dominant Ohio ILEC, to offer the UNE-P to competitive local exchange carriers (“CLECs”), a substantial portion of local residential competition in Pennsylvania and Ohio would disappear. Additionally, the FCC should consider the type of customers that a requesting carrier seeks to serve in implementing the unbundling provisions of TA-96. Finally, in implementing the unbundling provisions of TA-96, the FCC should also consider consumer interests and establish rules that maintain consumer protections and other FCC goals.

² See, 71 P.S. § 309-2 (PA OCA); Chapter 4911, Ohio Rev. Code (OCC); NH RSA 363:28 (NH OCA); West Virginia Code Sec. 24-1-1(f)(2) and WV PSC General Order 195.3 (W. Va. CA); Md. Code Ann., PUC Sec. 2-201 – 2-205 (1999) (Md. OPC).

In support of these Comments, the Consumer Advocates submit as follows:

2. SUMMARY

The FCC should ensure that state commissions retain the ability to require ILECs to offer to CLECs the UNE-P. The Consumer Advocates submit that it is imperative that state commissions retain this ability as most of the local telephone competition in many states, including Pennsylvania and Ohio, for residential customers is premised on CLECs providing alternative local exchange service through the UNE-P. If the FCC did not allow state commissions to require ILECs to provide the UNE-P to CLECs, this portion of the competitive market would likely disappear. The PA PUC, for example, has recognized the importance of the UNE-P in its Global Order³ and that CLECs competing in Pennsylvania have come to rely on the opportunity to serve customers through the UNE-P. Even though other state commissions, like Ohio, have not been as firm on the necessity for the UNE-P, it is nonetheless true that in these states the UNE-P has been the basis for much of the limited residential competition that has been seen. If the FCC did not allow state commissions to require ILECs to provide the UNE-P to CLECs, this portion of the competitive market would likely not develop at all and, in those areas where some limited competition has developed, would likely disappear.

³ In re: Nextlink Pennsylvania, Inc., 196 PUR 4th 172 (Pa.P.U.C. Sept. 30, 1999), *affirmed*, Bell-Atlantic Pennsylvania, Inc. v. Pennsylvania Public Utility Comm'n, 763 A.2d 440 (Pa. Cmwlth. Oct. 25, 2000)(“Global Order”), *appeal docketed*, No.1 EAP 2002 (Pa. Sup. Ct.).

The FCC should consider the type of customer that a requesting carrier seeks to serve in implementing the unbundling provisions of TA-96 so that the competitive provision of local exchange telephone service to residential customers can be further encouraged. Finally, the Consumer Advocates submit that the FCC's unbundling analysis should consider consumer interests and establish rules which maintain consumer protections and other FCC goals. In particular, the FCC should maintain its universal service goals and objectives while furthering local telephone competition.

3. COMMENTS

1. The FCC Should Ensure State Commissions' Prerogative To Require Incumbent Local Exchange Carriers To Offer The UNE-P. (NPRM ¶¶69, 75-76).

1. Introduction.

In the NPRM, the FCC seeks comment on the proper roles of state commissions in the implementation of unbundling requirements for ILECs.⁴ The FCC has interpreted Section 251(d)(3) of TA-96, which permits state commissions to establish access obligations that are consistent with the FCC unbundling rules, to grant authority to state commissions to impose additional obligations upon ILECs so long as those additional obligations meet the requirements of section 251, and the national policy framework under the UNE Remand Order.⁵ The FCC

⁴ NPRM at ¶75-76.

⁵ Id. at ¶75; *citing* Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3766 (“UNE Remand Order”) at ¶151.

recognized that state commissions may be more familiar than the FCC with the characteristics of markets and incumbent carriers within their jurisdictions and that state commissions should be able to recognize regional differences in determining UNE requirements.⁶ As such, the FCC seeks comment on whether national standards should be established that the states can apply to their ILEC's networks similar to what the FCC has done with regard to setting network element pricing.⁷

2. The Pennsylvania Public Utility Commission, In Its *Global Order*, Has Recognized The Importance Of ILECs Providing The UNE-P To CLECs.

The FCC should ensure that state commissions may continue to require ILECs to offer the UNE-P to CLECs. Much of the local telephone competition for residential customers in Pennsylvania, for example, is premised on CLECs providing alternative local telephone service through the UNE-P. If the PA PUC were no longer able to require ILECs to offer CLECs the UNE-P in Pennsylvania, a substantial portion of local residential competition in Pennsylvania would disappear. The PA PUC, in its Global Order, stated that

the importance of a CLEC's ability to obtain UNEs as a 'platform' cannot be overemphasized. Indeed, UNE-P is the only effective way for CLECs to begin immediately offering competitive local exchange services to a broad range of customers, and particularly residential and small business customers. ... the platform provides a critical transitional mechanism for reaching smaller customers sooner,

⁶ Id.

⁷ Id. ¶76.

especially in the rural areas of the state. Without it, those customers will see local exchange competition much later, if at all. In short, the platform permits CLECs to compete with [Verizon], with at least some advantages that [Verizon] possesses as the incumbent local exchange provider, on a more level playing field.⁸

⁸ Global Order at 214-215.

The PA PUC further stated that “[Verizon] has the obligation to combine elements (and, as a corollary, keep elements combined that are already combined) in a nondiscriminatory manner. Whatever means [Verizon] uses to combine elements for itself, whether manual or electronic, should be made available to CLECs.”⁹ The PA PUC specifically ordered Verizon to file a tariff or tariff supplement with UNE and UNE-P rates.¹⁰

⁹ Id. at 215.

¹⁰ Id. at 291. The PA PUC also ordered Verizon to offer EEL (Enhanced Extended Loop) rates in the Global Order. EELs are similar to UNE-P but are a combination of the loop and transport. Furthermore, the PA PUC held that it has its own independent state authority to require the UNE-P under Chapter 30 of the Pennsylvania utility statutes, 66 Pa.C.S.A. §3001, *et seq.*, and has done so prior to the enactment of TA-96. Global Order at 207; *citing*, 66 Pa.C.S.A. §3005(e)(1). The PA PUC also held that it has authority to require ILECs to offer the UNE-P through enforcement of Verizon-Pennsylvania’s existing interconnection agreements. Id. The Global Order allows Verizon to petition for review of whether this requirement should be continued after December 31, 2003. Id. at 216.

In the Global Order, the PA PUC cited the United States Supreme Court decision in Iowa Utilities Board I in noting that TA-96 allows entrants to access an entire preassembled network and that without access to a combination of UNEs, ILECs could impose wasteful costs on even those carriers who requested less than the whole network.¹¹ The PA PUC also cited the Iowa Utilities Board I decision in noting that there is no question that CLECs are permitted by TA-96 to provide service through UNEs *only*.¹² In ruling that Verizon must offer the UNE-P to CLECs, the PA PUC held that Verizon cannot favor one form of CLEC entry into the competitive market over another but that all forms of entry under TA-96 should be promoted so that each CLEC is permitted to make its own business decision as to how it wants to provide service.¹³ The Consumer Advocates submit that this would include CLECs' ability to provide such alternative service through the UNE-P and, therefore, the FCC should ensure state commissions' ability to require ILECs to provide the UNE-P to CLECs.

The Pennsylvania Commonwealth Court affirmed the Global Order in its entirety.

¹⁴ In doing so, the Court affirmed that making the UNE-P's "crucial combination of elements" available to a CLEC allows that CLEC to reach smaller residential and business customers sooner,

¹¹ Id. at 214; *citing*, AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 395, 119 S.Ct. 721, 738 (1999)("Iowa Utilities Board I").

¹² Id.; *citing*, Iowa Utilities Bd I at 119 S. Ct. at 736 (emphasis added).

¹³ Id. at 215.

¹⁴ See, Bell-Atlantic Pennsylvania, Inc. v. Pennsylvania Public Utility Comm'n, 763 A.2d 440 (Pa. Cmwlt. Oct. 25, 2000).

particularly in rural areas.¹⁵ The Pennsylvania Commonwealth Court referenced Section 251(c)(3) of TA-96 in establishing the general obligation of ILECs to create the UNE-P for the competitor when Verizon has effectuated such a combination for itself.¹⁶

The PA PUC recognized the importance of ILECs providing the UNE-P to CLECs in the development of a competitive market place for the provision of local residential telephone service. Other state commissions have not addressed the UNE-P issues as directly as the PA PUC. Consumer advocates in those states even more strongly support the need for the FCC to ensure the availability of the UNE-P. As such, the FCC should ensure state commissions' ability to require ILECs to provide the UNE-P to CLECs.

3. A Substantial Portion Of Local Residential Exchange Customers Served Through CLECs Are Served Through The UNE-P.

¹⁵ Id. at 483.

¹⁶ Id. at 485.

The latest FCC statistics reveal that, nationwide, ILECs have provided almost 8 million UNE loops to other carriers as of June 30, 2001, an increase of almost 50% since the end of 2000.¹⁷ Of that number, about 3.2 million were provided without switching and about 4.8 million were provided with switching.¹⁸ ILECs reported providing about 5.4 million lines to other carriers on a resale basis at the end of 2000 compared to about 4.4 million lines at the end of June 2001.¹⁹ The FCC also reports that UNE loops provided with ILEC switching (which includes the UNE-P) have increased faster than UNE loops provided without switching.²⁰ CLECs reported providing only about one-third of their switched access lines over their own local loop facilities.²¹

In Pennsylvania, the activities of CLECs show the need for the FCC to ensure state commissions' ability to require ILECs to provide the UNE-P. A substantial portion of residential local exchange customers served through CLECs in Pennsylvania are served through the UNE-P.²² In Ohio, there are only two CLECs actively serving the residential market: CoreComm and MCI

¹⁷ "Local Telephone Competition: Status as of June 30, 2001," Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, February, 2002, at 2.

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

²¹ Id. at 1.

²² The specific number of residential customers in Pennsylvania receiving local telephone service through the UNE-P is not readily determinable due to the proprietary nature of such information. The PA OCA has spoken informally with several CLECs who are providing local residential service in Pennsylvania. These CLECs have indicated that a substantial majority of their customers are served via the UNE-P. This information is generally confirmed by aggregated public data released by Verizon-Pennsylvania.

WorldCom. Both of these CLECs depend heavily on the UNE-P. Indeed, WorldCom did not appear in Ohio until a favorable ruling by the PUCO on the non-recurring charge for the UNE-P.

Many CLECs who have been successful in developing a share of the local residential market serve their residential customer base using predominantly the UNE-P. CLECs use the UNE-P instead of serving customers through resale of ILEC services because it is more economical and provides greater flexibility for CLECs to design their own calling packages and potentially the ability to develop more advanced services using the functionality of the ILECs' switches. CLECs also use the UNE-P instead of constructing their own facilities. Z-Tel, a nationwide CLEC with 260,000 access lines in 35 states, calls the UNE-P the "key to a successful revolution in telecommunications markets," because it provides a rapid and ubiquitous competitive choice for mass market consumers.²³ Z-Tel argues that only the UNE-P permits rapid deployment capabilities needed to serve the mass market. Z-Tel contends that, without the UNE-P, CLECs will face problems with capacity constraints, provisioning costs and network inefficiencies including problems with "hot cuts."

²³ Koutsky, Thomas M., "The Great UNE-P Debate." Handout at presentation to the National Association of Regulatory Utility Commissioners ("NARUC"), February 9, 2002. Z-tel defines the "mass market" as over 160 million analog, dialtone lines nationwide, including 54 million lines in Verizon territory. *See*, ARMIS 2000, Table 43-08; *see also*, Smith, Gregg, "Putting the Horse before the Cart: The History and Future of the UNE Platform." Z-Tel Technologies, Inc. (February 2001), at 1.

Opponents of FCC rules that enable state commissions to require ILECs to offer the UNE-P to CLECs argue that requiring ILECs to provide the UNE-P to CLECs does not encourage facilities development. It is true that deployment of CLECs' own switches may further modernize infrastructure and possibly, some argue, provide a more reliable means of local telephone competition. In fact, throughout Pennsylvania, CLECs have deployed many switches. Nationwide, Verizon, indicated in a recent *ex parte* filing, that, according to the competing carrier trade association, there are nearly 1,000 competitive voice switches and more than 2,000 data switches as of the end of year 2000.²⁴

However, the Consumer Advocates submit that, at this nascent stage of the competitive marketplace, it is not realistic to expect many CLECs to use their own or other CLEC switches to provide local telephone service to residential customers. Using CLEC switches is not currently an economically feasible method for many CLECs to develop market share, particularly in the residential market. Conversely, being able to provide local telephone service to residential customers through the UNE-P enables CLECs to develop the necessary market share that may result in deployment of their own switches in the future. As such, the UNE-P is often viewed by CLECs as the best, and only, means of developing the necessary critical mass of customers to justify the use of their own switching facilities, particularly in the residential market.

²⁴ See, Letter from Thomas J. Tauke, Senior Vice President, and Michael E. Glover, Senior Vice President, Verizon Communications, to Michael Powell, Chairman, Federal Communications Commission. Petition for Reconsideration of the Third Report and Order, CC Docket No. 96-98, (filed Oct. 19, 2001).

Furthermore, transferring customers from one service provider to another service provider that uses the UNE-P avoids the problems that arise with switching customers from the ILEC switch to their own CLEC switch (often called a “hot cut”). Some ILECs are unable to “hot cut” transfer a substantial amount of customers in an expeditious manner. Problems with “hot cut” transfers are exacerbated for a CLEC that is successful in obtaining a substantial number of customers. For example, if a CLEC obtains 500,000 customers in a region and wishes to install its own switch to serve those customers, but the ILEC can only do 10,000 “hot cuts” per month, it would take 50 months to move all of the CLEC’s customers to the CLEC’s switch. As such, for over four years, the CLEC would be paying for a switch that was not fully utilized while also buying the UNE-P for local switching from the ILEC in the interim. While some states are examining how to streamline the “hot cut” process,²⁵ such problems are more limited when transferring a CLEC’s customers that have been served through the UNE-P to that CLEC’s switch.²⁶ Thus, the problem of moving CLEC customers to a CLEC switch may relate to the problem of the ILEC reconnecting those customers to CLEC the switch as well as to encouraging the CLEC to invest in such a switch.

Although ILECs have emphasized the need for full facilities based entry, TA-96 specifically articulates other forms of competitive entry. CLECs argue that it is in the public interest for CLECs to deploy their limited capital in the UNE-P where it will have the greatest public benefit

²⁵ See, Proceeding on Motion of the Commission to Consider Cost Recovery by Verizon New York, Inc., fka, New York Telephone Company, and Modification of Performance Regulatory Plan Under Merger Standards and to Investigate the Future Regulatory Framework, NY PSC Docket No. 00-C-1945 (issued and effective Nov. 3, 2000).

²⁶ Through the use of electronic loop provisioning, customers would be able to switch to a CLEC more quickly and with less chance of a disruption in service. CLECs experience less delay and technical difficulties when switching a customer from the ILEC to their system when serving that customer through the UNE-P.

by providing alternatives to consumers. Using the UNE-P as a method for entering the local residential telephone market allows CLECs more flexibility and quicker entry in order to sustain entry to the residential market. In states where the UNE-P has been allowed to grow, there has been a more substantial growth in the CLEC line count. The UNE-P allows CLECs to enter the urban and rural markets and also provide new services.

As such, the Consumer Advocates submit that CLEC activity in Pennsylvania and nationwide supports the FCC ensuring state commissions' ability to require ILECs to provide the UNE-P to CLECs.²⁷

4. Conclusion.

The FCC should ensure state commissions' prerogative to require ILECs to offer the UNE-P to CLECs. If the PA PUC, for example, were unable to require Pennsylvania ILECs to require the UNE-P, a large portion of local telephone competition for residential customers in Pennsylvania would disappear. Should the FCC modify the minimum national standards that the states may apply to UNEs in the ILECs' networks, the Consumer Advocates submit that such national standards should include the ability to require the UNE-P. States are better situated to tailor unbundling rules that more precisely fit their markets, including the importance of obligating ILECs to offer CLECs the UNE-P. As indicated above, the PA PUC has already completed an extensive investigation to determine what UNEs ILECs must provide to CLECs and a substantial portion of

²⁷ NARUC also supports state commissions' ability to require ILECs to provide additional unbundling. NARUC has recently passed a resolution that "urges the FCC to recognize that States may continue to require additional unbundling to that required by the FCC's national minimum ... consistent with the purposes of [TA-96] and in accordance with other state or federal law." See, Resolution Concerning the States' Ability to Add to the National Minimum List of Network Elements, Adopted by the NARUC Board of Directors (February 13, 2002).

CLEC local telephone service to residential customers in Pennsylvania is through the use of the UNE-P. Such efforts should not be wasted by a removal of the PA PUC's authority to require ILECs to offer the UNE-P.

As such, the Consumer Advocates submit that the FCC should ensure state commission's prerogative to require ILECs to offer the UNE-P.

2. The FCC Should Consider The Type Of Customer That A Requesting Carrier Seeks To Serve In Implementing The Unbundling Provisions Of TA-96. (NPRM ¶¶42-43).

In the NPRM, the FCC seeks comment on whether the FCC should consider the type of customer that a requesting carrier seeks to serve as the unbundling provisions of TA-96 are implemented.²⁸ The FCC recognizes that it cannot, as a practical matter, consider the characteristics of each customer individually, but seeks comment on whether the availability of UNEs should differ depending on whether the requesting carrier is using them to serve residential customers as opposed to business customers.²⁹ The FCC notes that it has previously found in its UNE Remand Order that “the type of customers that a competitive LEC seeks to serve is relevant to [the] analysis of whether the cost of self-provisioning or acquiring an element from a third-party supplier impairs the ability

²⁸ NPRM at ¶43.

²⁹ Id.

of a requesting carrier to provide the services it seeks to offer.”³⁰ Therefore, the FCC seeks comment on the interplay of customer and business considerations within section 251(c)(3)’s requirement that elements be made available on a nondiscriminatory basis.³¹

In conjunction with the preceding comments regarding ensuring state commissions’ prerogative to require ILECs to offer the UNE-P to CLECs, the Consumer Advocates submit that this assurance is needed to protect the opportunity for local *residential* customers, in particular, to receive the benefits from telephone competition. The FCC must recognize that local telephone competition has been slow to come to residential customers. Many residential customers throughout the nation will not soon, if at all, see any reasonable alternative for their local telephone service, particular in high-cost areas. By considering the needs of residential customers as a whole and as the type of customer that a requesting carrier may seek to serve, the FCC can further ensure, in implementing the unbundling provisions of TA-96, that local telephone competition will become a reality for residential customers.

The Consumer Advocates are not requesting that the FCC consider the characteristics of each customer individually which, as the FCC recognizes in its NPRM, it cannot do as a practical matter. However, the FCC should differentiate the availability of UNEs depending on whether the requesting carrier is using those UNEs to serve residential customers. The Consumer Advocates do

³⁰ Id. at ¶42; *citing*, UNE Remand Order, *supra*, 15 FCC Rcd at 3737, para. 81.

³¹ Id. at ¶43.

not seek to minimize the importance or the value of providing local telephone competition to business customers. Yet, it appears that CLECs have more incentive to serve larger business class customers. Given the slowness with which local telephone competition has reached residential customers outside of a few select areas, it appears appropriate that the FCC consider the type of customer that a requesting carrier seeks to serve in implementing the unbundling provisions of TA-96. This would ensure that greater competition can be encouraged for a majority of the residential customers.

The FCC should reaffirm its previous finding that the type of customer that a CLEC seeks to serve is relevant to the analysis of whether the cost of self-provisioning or acquiring an element from a third-party supplier impairs the ability of a requesting carrier to provide the services it seeks to offer.³² The Consumer Advocates commend the FCC in seeking comment on the interplay of customer and business considerations with section 251(c)(3)'s obligations. Now, the FCC should recognize the need to further encourage local telephone competition for *residential* customers in particular by recognizing those CLECs that seek to serve residential customers when implementing the unbundling provisions of TA-96.

As such, the Consumer Advocates submit that the FCC should consider the type of customer that a requesting carrier seeks to serve in implementing the unbundling provisions of TA-96 and further encourage the provision of a competitive market place for local residential telephone customers.

³² See, footnote 30, *supra*.

3. The FCC’s Current National List Of Minimum Required UNEs, As Defined Under The United States Supreme Court’s “Necessary” And “Impair” Standard, Should Not Be Reduced. (NPRM ¶¶15-20).

In Iowa Utilities Bd I, the United States Supreme Court directed the FCC’s attention to the “necessary” and “impair” standard in Section 251(d)(2) of TA-96.³³ In the UNE Remand Order, the FCC reconsidered its statutory analysis of this section and based its list of UNEs that ILECs are required to offer to CLECs based upon whether lack of access to a particular element would *preclude* a requesting carrier from, or diminishes a requesting carrier’s ability to, provide the services it seeks to offer.³⁴ This was based on the proprietary nature of the element, and then the FCC determined whether the requesting carriers were impaired without access to that element. In this NPRM, the FCC seeks Comment on how to apply the section 251(d)(2) analysis, on a going forward basis, in a manner that is faithful to TA-96 and promotes its goals.³⁵ More specifically, the FCC seeks Comment on whether its current approach, as reinterpreted in the UNE Remand Order, should continue, or whether the FCC should first identify impairments to a requesting carrier’s ability to provide service, and then define network elements that specifically address such impairments.³⁶

³³ Iowa Utilities Bd. I, *supra*.

³⁴ UNE Remand Order, at para. 35, 41-47, 51.

³⁵ NPRM, at ¶16.

³⁶ Id. at ¶20.

In the UNE Remand Order, the FCC revised its original interpretation of the “necessary” and “impair” standards of section 251(d)(2) in order to identify specifically where requesting carriers are impaired without access to the ILECs network, rather than making UNEs available wherever it is technically feasible to do so.³⁷ In so doing, the FCC held that a proprietary network element is necessary if the lack of access to that element would, as a practical, economical, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer.³⁸ The FCC then held that “the failure to provide access to a non-proprietary network element would impair the ability of a requesting carrier to provide the services it seeks to offer if ... lack of access to that element *materially* diminishes a requesting carrier’s ability to provide the service it seeks to offer.”³⁹

As such, the FCC identified seven network elements without which requesting carriers would be impaired. These elements include:

1. Loops, including high-capacity lines, dark fiber, line conditioning and some inside wire;
2. Subloops;
3. Network interface devices;
4. Local circuit switching (but not most packet switching);

³⁷ Id. at ¶7.

³⁸ Id.; *citing*, UNE Remand Order, 15 FCC Rcd at 3721, para. 44 (emphasis in original).

³⁹ Id.; *quoting*, UNE Remand Order, 15 FCC Rcd at 3725, para. 51 (emphasis added).

5. Interoffice transmission facilities, including dedicated transport from DS1 to OC96 capacity levels and such higher capacities as evolve over time, dark fiber and shared transport;
6. Signaling networks and call-related databases; and
7. Operations support systems (OSS).⁴⁰

Shortly after the UNE Remand Order, the FCC added in a separate order the high frequency portion of the loop to the list of elements that must be unbundled on a national basis.⁴¹

⁴⁰ Id. ¶10; *citing*, UNE Remand Order, 15 FCC Rcd at 3771-3890, paras. 162-437. *See also*, 47 C.F.R. §51.319(a)-(h).

⁴¹ Id.; *citing*, Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (1999).

In the current NPRM, the FCC reviewed this national list of minimum required UNEs as well as its UNE analysis procedures. In particular, the FCC sought comment on the weight to be assigned to the factors in the “impair” standard and whether the FCC should first identify network elements or impairments in the unbundling analysis.⁴² The FCC also sought comment on applying the unbundling analysis to specific services and specific geographic locations, differing facilities, differing end-users and differing mechanisms for transitioning to a more competitive marketplace.⁴³ Most importantly, however, the FCC also sought comment on the myriad issues concerning each of the specific elements that are currently included on the national list of minimum required UNEs states may require ILECs to provide to CLECs. Essentially, the FCC seeks comment on whether each of the current list of UNEs should remain on the national list of unbundling requirements or whether the requirement, or existing definition for these elements, should be modified in light of changed circumstances.⁴⁴

The Consumer Advocates encourage the FCC to maintain the national list of minimum UNE requirements as articulated in the UNE Remand Order. The Consumer Advocates submit that local telephone competition is in its nascent stage and has not yet developed to the point where the national list of minimum UNE requirements can be reduced. In fact, throughout the FCC’s consideration of whether these network elements should remain on the national list, the FCC

⁴² Id. at ¶¶18-20.

⁴³ Id. at ¶¶34-46.

⁴⁴ Id. at ¶¶48, 53, 55, 61, 64.

references whether “changed circumstances” warrant keeping these elements on the national list.

The Consumer Advocates are unaware of changed circumstances that would warrant the removal of any of these elements from the national list. In fact, the slow rate with which CLECs have been acquiring market share of local access lines indicates that it is the *lack* of changed circumstances that should be of greater concern to the FCC. The FCC should, if anything, make modifications to the list that would further enable CLECs to acquire more market share, not reduce that opportunity.

The Consumer Advocates emphasize the importance of the United States Supreme Court’s analysis of the national list of UNEs and the use of those guidelines created by the Supreme Court’s decision should result in maintaining the current UNE list. This should also allow the opportunity for state commissions to go beyond the national list consistent with TA-96 in establishing their own list of UNEs that ILECs are required to make available to CLECs. Consumers will reap the greatest benefits through local telephone competition if CLECs have the opportunity to provide service options through the current list of UNEs including the UNE-P, if available, as discussed above. Should the FCC reduce or modify the national list of UNEs at this juncture in the development of the competitive market, CLECs will have less opportunity to provide real competitive choice and consumers will lose the benefit of their bargain acquired in the passage of TA-96.

As such, the Consumer Advocates submit that the FCC’s current national list of minimum required UNEs, as defined under the United States Supreme Court’s “necessary” and “impair” standard, should not be reduced or modified. In fact, the slow rate of CLEC access line growth supports the determination that the national list should not be reduced, but should be maintained so as to further encourage competition in the local telecommunications marketplace.

4. The FCC's Unbundling Analysis Should Consider Consumer Interests And Establish Rules Which Maintain Consumer Protections And Other FCC Goals. (NPRM ¶¶31-33).

In the NPRM, the FCC stated that there are several factors for consideration in the unbundling analysis that advance other statutory goals.⁴⁵ In particular, the FCC has recognized that unfettered availability of UNEs can implicate universal service funding, damage the system of access charges, and has imposed restrictions on the use of certain UNEs.⁴⁶ Therefore, the FCC has initiated ongoing proceedings in response to these issues and now seeks Comment on whether and to what extent universal service should be considered in the unbundling analysis and, if so, how.⁴⁷

⁴⁵ NPRM at ¶31; *citing*, UNE Remand Order, 15 FCC Rcd at 3747-50, paras. 107-16.

⁴⁶ Id.; *citing*, Implementation of Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order, 15 FCC Rcd 1760 (1999).

⁴⁷ Id. at ¶32.

The Consumer Advocates submit that the FCC unbundling analysis must consider universal service and establish rules that maintain consumer protections as well as other FCC goals. For example, Section 254 of TA-96 specifically details the intent of Congress to preserve and advance universal service.⁴⁸ More specifically, this section provides, *inter alia*, that:

the Commission shall base policies for the preservation and advancement of universal services on the following principles:

(1) Quality and Rates – Quality services should be available at just, reasonable and affordable rates.

(2) Access to Advanced Services – Access to advanced telecommunications services and information services should be provided in all regions of the Nation.

(3) Access in Rural and High Cost Areas – Consumers in all regions of the Nation, including low-income consumers and those in rural, insular and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications services and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

* * * * *

(6) Access to Advanced Telecommunications Services For schools, Health Care, and Libraries – Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).

(7) Additional Principles – Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the

⁴⁸ 47 U.S.C. §254(b).

protection of the public interest, convenience and necessity and are consistent with this Act.⁴⁹

Congress has articulated many important and fundamental goals in TA-96. TA-96 does not subjugate one section of the Act to another so that in no way is Section 254 secondary to ILECs unbundling obligations in Section 251.

⁴⁹

Id.

In Pennsylvania, the General Assembly has similar goals and objectives for its telecommunications needs. In enacting Chapter 30 of the Public Utility Code in 1993, the Pennsylvania General Assembly determined that it is the policy of the Commonwealth to, *inter alia*, “maintain universal telecommunications service at affordable rates while encouraging the accelerated deployment of a universally available, state-of-the-art, interactive, public-switched broadband telecommunications network in rural, suburban and urban areas” and “encourage the competitive supply of any service in any region where there is market demand.”⁵⁰ Therefore, the Pennsylvania General Assembly has also recognized the importance of balancing a variety of telecommunications goals and that one goal should not outweigh another.⁵¹

The Consumer Advocates submit that Congress also did not intend for ILEC unbundling obligations to be implemented in a manner that would disregard the important universal provisions in Section 254 as well as other FCC goals and objectives. Increased telephone competition should not result in consumers not having telephone service or paying increased prices. Clearly, the universal service goal of Congress and the FCC should be considered when analyzing ILECs unbundling obligations.

⁵⁰ 66 Pa.C.S. §3001(1).

⁵¹ Unfortunately, in Ohio, the statutory description of state telecommunications policy is somewhat older and does not explicitly include many of the concepts in the Pennsylvania legislation.

5. CONCLUSION

WHEREFORE, the Pennsylvania Office of Consumer Advocate, the Ohio Consumers' Counsel, the New Hampshire Office of Consumer Advocate, the West Virginia Consumer Advocate Division and the Maryland Office of People's Counsel respectfully submit that the Federal Communications Commission consider these Comments when analyzing its unbundled network element policies and practices. In particular, the Consumer Advocates submit that the FCC should allow state commissions to require ILECs to be obligated to provide the UNE-P to CLECs.

Very truly yours,

Philip F. McClelland, Senior Assistant Consumer Advocate

Joel H. Cheskis, Assistant Consumer Advocate
Pennsylvania Office of Consumer Advocate
555 Walnut Street, 5th Floor, Forum Place
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048

Robert S. Tongren
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574

Michael W. Holmes, Consumer Advocate
F. Anne Ross, Assistant Consumer Advocate
New Hampshire Office of Consumer Advocate
117 Manchester Street
Concord, New Hampshire 03301
(603) 271-1172

Billy Jack Gregg
Counsel for the West Virginia
Consumer Advocate
700 Union Building
Charleston, West Virginia 25301
(304) 558 - 0526

Michael J. Travieso
People's Counsel
Maryland Office of People's Counsel
6 St. Paul Street, Suite 2102
Baltimore, Maryland 21202
(410) 767- 8150

April 5, 2002

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April 5, 2002

Office of the Secretary
Federal Communications Commission
445 12th Street, S. W.
Washington, DC 20554

In the matter of: Review of the Section 251
Unbundling Obligations of Incumbent Local
Exchange Carriers
CC Docket No. 01-338

Dear Secretary:

Enclosed please find an original and four copies of Comments of the Pennsylvania Office of Consumer Advocate, the Ohio Consumers' Counsel, the New Hampshire Office of Consumer Advocate, the West Virginia Consumer Advocate Division and the Maryland Office of People's Counsel in the above-referenced matter. Please also note that these Comments have been filed with the Commission electronically.

Please indicate your receipt of this filing on the additional copy provided and return it to the undersigned in the enclosed self-addressed, postage prepaid, envelope. Thank you.

Sincerely yours,

Joel H. Cheskis
Assistant Consumer Advocate

Enclosure

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the matter of	:	
	:	
Review of the Section 251 Unbundling	:	CC Docket No. 01-338
Obligations of Incumbent Local Exchange	:	
Carriers	:	

I hereby certify that I have this day served a true copy of the foregoing document,
Comments, upon parties of record in this proceeding.

Dated this 5th day of April, 2002.

Respectfully submitted,

Joel H. Cheskis
Assistant Consumer Advocate

Counsel for
Office of Consumer Advocate
555 Walnut Street, Forum Place, 5th Floor
Harrisburg, PA 17101-1923
(717) 783-5048

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